



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 44 OF 2022

1. Vijay Kapurchand Agarwal **... APPELLANT**
(Ori. Objectitioner)

VERSUS

1. Jai Kapurchand Agarwal,
2. Smt. Savita Ajay Agarwal,
3. Anish Ajay Agarwal,
4. Akash Ajay Agarwal **... RESPONDENTS**
(Resp. No.1 – Ori. Applicant)

...
Mr. K.R.Doke – Advocate for Appellate
Mr. Y.G. Gujarathi – Advocate for Respondent No.1
....

CORAM : SANDIPKUMAR C. MORE, J.
DATE : 21st March, 2024

ORDER :

1. The appellant has challenged the order dated 21.02.2022 passed by the learned District Judge – 1, Ambajogai, Dist. Beed, in Miscellaneous Civil Appeal No.32 of 2007 whereby the memo of appeal filed by the present appellant has been returned to him for presenting before this Court.

2. The background facts of the case are as under :

The present appellant is the original Objection Petitioner in

Miscellaneous Civil Application No.1 of 2006 which was filed by the present respondent No.1 before the learned District Delegate i.e. learned Civil Judge Senior Division, Ambajogai (hereinafter referred to as "*the learned Trial Court*") for grant of probate under Section 276 of the Indian Succession Act, 1925. In the said application the present appellant as well as respondent Nos.2 to 4 had raised contention by filing Objection Petition on 18.01.2006. Thereafter, the learned District Delegate proceeded with the matter and granted the probate in respect of Will of deceased Kapurchand Govardhandas Agarwal in favour of respondent No.1. Being aggrieved with the said order the appellant preferred Miscellaneous Civil Appeal No.32 of 2007 on 23.07.2007 before the learned District Court. However, the said appeal was not decided for quite a long period but ultimately, the learned District Judge – 1 under the impugned order returned the memo of appeal to the appellant for presenting it before this Court as per Order VII Rule 10 of the Civil Procedure Code ("C.P.C." for short).

3. Learned Counsel for appellant strongly submits that, the District Delegate should not have granted probate since a contention was raised by the present appellant and respondent

Nos.2 to 4 and, therefore, as per Section 286 of the Indian Succession Act, 1925 the learned District Delegate was not having any power to decide the matter. According to the learned Counsel for appellant that, the District Delegate should have transferred the proceeding to the learned District Judge for deciding the same. He also pointed out that, even in the appeal, the learned District Judge – 1 should have set aside the decree passed in the original application of granting probate as per the explanation under Order VII Rule 10 of C.P.C. at the time of return of appeal memo.

4. On the contrary, learned Counsel for respondent No.1 strongly opposed the submissions made on behalf of the appellant so far as the contention of setting aside the order of learned District Delegate. According to him, when the learned District Judge -1 was not having any jurisdiction to entertain such appeal then there was no question of setting aside the decree.

5. Heard rival submissions and also perused the documents on record. It is significant to note that, as per the judgment passed by this Court in the case of **Nola Jonathan Ranbhise (Smt.) Vs. Union of India and Others** reported in 2014 (3) Bom.C.R. 641, it has been observed as follows :

(a) It is hereby declared that sub-sections (2) and 3) of section 28-A of the Bombay Civil Courts Act, 1869 are inconsistent with the repugnant to the provisions of section 299 of the Indian Succession Act, 1925 and consequently the same stand impliedly repealed. Accordingly, every order made by the District Judge under the Indian Succession Act, 1925 or every order made by a Civil Judge invested with the powers of a District Judge or a District Court, as the case may be, under the Indian Succession Act, 1925 in terms of sub-section (1) of section 28-A of the Bombay Civil Courts Act, 1869 shall be subject to appeal to the High Court in accordance with the provisions of Code of Civil Procedure, 1908, applicable to appeals;

6. Learned Counsel for appellant heavily relied on the explanation of Order VII Rule 11 of C.P.C. and claimed that, when the learned First Appellate Court has returned the appeal memo for presenting before this Court then it was bound to set aside the decree/order of the learned Trial Court of granting probate. He also argued that, the learned Trial Court should not have decided the application, as the appellant and respondent Nos.2 to 4 had already raised contention by filing Objection Petition in respect of granting probate to the respondent No.1. Thus, he contended that, the learned Trial Court has in fact passed the order without jurisdiction.

7. It is significant to note that, as per the observation in Nola's (*supra*) case, it has been specifically held that, every order made by the District Judge under the Indian Succession Act, 1925 or every order made by a Civil Judge invested with the powers of a District Judge or a District Court, as the case may be, under the Indian Succession Act, 1925, shall be subjected to appeal to this Court. According to the learned Counsel for appellant, since there was contention raised by the present appellant, the learned Trial Court should not have passed any order as per Section 286 of the Indian Succession Act, 1925 and it should have transferred the said dispute to the learned District Judge – 1. However, the learned Trial Court has already passed that order and the learned First Appellate Court in view of the observation in Nola's (*supra*) case returned the appeal memo to the appellant for filing it to this Court.

8. Learned Counsel for the appellant is insisting for setting aside the decree as per explanation to Order VII Rule 10 of C.P.C. Admittedly, such explanation is there but it appears that, as per the ratio laid down in Nola's (*supra*) case the learned First Appellate Court has only returned the appeal memo and has not

observed anything on merit about order of the learned Trial Court of granting probate. Further, it is also important to note that, this Court on the very first date i.e. on 01.08.2022 has stayed the impugned order dated 21.02.2022 passed by the learned District Judge, Ambajogai till next date and continued the same from time to time till today. During the course of argument it was brought to the notice that, the order of granting probate in favour of respondent No.1 by the learned Trial Court on 04.11.2006 is not yet impleaded or executed. Therefore, in the light of such peculiar facts of the case this Court is of opinion that, instead of setting aside the order passed by the learned Trial Court as per the explanation under Order VII Rule 10 of C.P.C. the execution and implementation of that order dated 04.11.2006 passed by the learned Trial Court i.e. learned District Delegate can be stayed till filing of the appeal by the present appellant before this Court. It is to be noted here that, the appellant has already filed that appeal memo which has been returned to him by the learned First Appellate Court alongwith this appeal. Therefore, considering all the aforesaid aspect following order is passed :

ORDER

(A) The appeal is hereby dismissed with direction to the

appellant to file the appeal as per the order of learned First Appellate Court, in this Court. For that purpose, the appeal memo which has been returned to the appellant from the learned First Appellate Court annexed to this appeal be returned to him.

(B) Till filing of the appeal by the appellant as per the order of learned First Appellate Court i.e. learned District Judge – 1 at Ambajogai, execution and implementation of judgment and order dated 04.11.2006 passed by the learned Trial Court i.e. Civil Judge Senior Division, Ambajogai in Miscellaneous Civil Application No.1 of 2006 is stayed.

(C) The Appeal from Order is accordingly disposed of.

**[SANDIPKUMAR C. MORE]
JUDGE**

LATER ON

9. Learned Counsel for appellant after pronouncement of order submits that, the appellant was litigating before the wrong Forum, in bonafide manner and, therefore, while filing the appeal before

this Court Section 14 of the Limitation Act be considered. In view of such submission, this Court is expected to consider the time spent by the applicant in prosecuting before the learned First Appellate Court in Miscellaneous Civil Appeal No.32 of 2007, being the time as mentioned in Section 14 of the Limitation Act.

[SANDIPKUMAR C. MORE]
JUDGE